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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

(HONORABLE DANA M. SABRAW)

UNITED STATES OF AMERICA, Plaintiff, v. CARLOS CRUZ-SANCHEZ, Defendant.	Criminal No. 08CR2025-DMS Date: August 15, 2008 Time: 11:00 a.m. NOTICE OF MOTIONS AND MOTIONS TO 1) PRODUCE DISCOVERY; 2) DISMISS INDICTMENT DUE TO FAILURE TO PROPERLY ALLEGE AN OFFENSE; 3) DISMISS THE INDICTMENT DUE TO MISINSTRUCTION OF THE GRAND JURY; and 4) FILE FURTHER MOTIONS

TO: KAREN P. HEWITT, UNITED STATES ATTORNEY, and DALE A. BLAKENSHIP, ASSISTANT UNITED STATES ATTORNEY

PLEASE TAKE NOTICE that Defendant, Carlos Cruz-Sanchez, by and through his Counsel, David J. Zugman, files these initial Rule 12 motions to be heard August 15, 2008, at 11:00 a.m. before the Honorable Dana M. Sabraw.

These motions are based upon the facts and law pertaining to this case. Specifically Mr. Cruz-Sanchez moves the Court to order the following relief:

1) Produce discovery;

2) Dismiss Indictment Due to Failure to Properly Allege an Offense;

3) Dismiss the Indictment Due to Misinstruction of the Grand Jury;

4) File Further Motions.

This motion is based upon the information received from the government thus far.

Respectfully Submitted,

Date: August 1, 2008

S/David J. Zugman
David J. Zugman
Attorney for Mr. Cruz-Sanchez

PROOF OF SERVICE

I, the undersigned, declare that:

1. I am over 18 years of age; am a resident of the County of San Diego, State of California; my business address is 964 Fifth Avenue, Suite 300, San Diego, California, 92101-5008.

2. I am effecting service of DEFENDANT'S MOTIONS on the following parties by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them:

Dale A. Blakenship, Assistant U.S. Attorney
Office of the U.S. Attorney
880 Front Street
San Diego, CA 92101

3. I hereby certify that I have mailed the foregoing, by United States Postal Service to the following non-EFC participants in this case:

1. N/A

to the last known address, at which place there is delivery service of mail from the United States Postal Service.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 1, 2008.

S/David Zugman
DAVID J. ZUGMAN

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

(HONORABLE DANA M. SABRAW)

UNITED STATES OF AMERICA, Plaintiff, v. CARLOS CRUZ-SANCHEZ, Defendant.	Criminal No. 08CR2025-MLH MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

Mr. Cruz-Sanchez respectfully submits these initial Federal Rule of Criminal Procedure 12 motions. These motions are based upon the discovery received from the government thus far. Mr. Cruz-Sanchez has yet to be granted access to his A-file documents though he believes that the viewing will be arranged soon. Mr. Cruz-Sanchez cannot yet file his attack on the underlying removal/deportation because he has yet to receive and review the documents underlying this deportation and therefore he would only be able to file a skeletal version of the argument. Once the government has produced the relevant discovery, Mr. Cruz-Sanchez will file his challenge.

II.

STATEMENT OF FACTS

The factual predicate that Mr. Cruz-Sanchez will assert is gleaned from the Government's discovery and does not necessarily constitute Mr. Cruz-Sanchez's version of the facts. Mr. Cruz-Sanchez may well argue a different factual predicate at the time of trial, though it is a near certainty that these will be the facts as adduced by the Government.

On May 6th, 2008, in the early evening, Border Patrol Agent Barrientos saw someone jump the international fence about 500 yards from the Calexico Port of Entry. Agent Barrientos stopped the person and interviewed him about his immigration status. The person, later identified as Carlos Cruz-Sanchez, admitted to being a citizen of Mexico without a legal right to be in the United States.

Records checks showed that Mr. Cruz-Sanchez had been deported before, but did not show that Mr. Cruz-Sanchez had applied for or received permission to reenter the United States.

Mr. Cruz-Sanchez was later advised of his *Miranda* rights and answered questions. This prosecution ensued.

III.

PRODUCE DISCOVERY

Mr. Cruz-Sanchez has requested Rule 12, 16, and 26 by letter dated June 27, 2008 and by phone that same day. Mr. Cruz-Sanchez reiterates that request now and asks that the Government produced all constitutionally and statutorily required discovery. The Government has produced 160 pages and a DVD of Mr. Cruz-Sanchez's statement thus far. Mr. Cruz-Sanchez would ask that the Government comply with Rule 16 and provide every document that it intends on relying upon to show that Mr. Cruz-Sanchez failed to return without permission to the United States.

IV.

THE INDICTMENT FAILS TO PROPERLY ALLEGE AN OFFENSE

On June 18, 2008, the government obtained a one count indictment alleging the following:

> On or about May 6, 2008, within the Southern District of California, defendant CARLOS CRUZ-SANCHEZ an alien, knowingly and intentionally attempted to enter the United States of America with the purpose, i.e., the conscious desire, to enter the United States without the express consent of the Attorney General of the United States or his designated successor, the Secretary of the Department of Homeland Security, after having been previously excluded, deported and removed from the United States to Mexico, and not having obtained said express consent to reapply for admission thereto; and committed an overt act to wit, crossing the border form the Mexico into the United States, that was a substantial step toward committing the offense, all in violation of Title 8, United States Code, Section 1326(a) and (b).
>
> It is further alleged that defendant CARLOS CRUZ-SANCHEZ was removed from the United States subsequent to September 21, 2000.

As written, the indictment fails to establish probable cause to believe that an offense was committed against the U.S.. This indictment allows the Grand Jury to find probable cause for this offense if it found that either the Attorney General or the Secretary of the Department of Homeland Security did not consent to Mr. Cruz-Sanchez's reapplication to admission to the United States. Since the creation of the Department of Homeland Security, however, it is now clear that Section 1326 requires that United States prove that the Secretary of the Department of Homeland Security did not consent. *See* 6 U.S.C. § 557.[1] Section 557

[1] "With respect to any function transferred by or under this Act (including under a reorganization plan that becomes effective under section 1502 [6 USCS § 542]) and exercised on or after the effective date of this Act, reference in any other Federal law to any department, commission, or agency or any officer or office the functions of which are so transferred shall be deemed to refer to the Secretary, other official, or component of the Department to which such function is so transferred."

went into effect on January 24, 2003. Since the indictment states that Mr. Cruz-Sanchez was removed sometime after September 1, 2000, his removal could have occurred prior to the creation of the Department of Homeland Security. Because of the indictment's unconstitutional vagueness, it is unclear whether the relevant entity did not consent to Mr. Cruz-Sanchez's attempted reentry. As written, the grand jury could have found that Attorney General did not consent to Mr. Cruz-Sanchez's reentry when in actuality the Secretary of the Department of Homeland Security was the relevant decision-maker or vice versa. The failure of the wrong entity to consent to Mr. Cruz-Sanchez's attempted reentry would not create a valid charge of illegal entry after deportation under Section 1326.

A disjunctive indictment is insufficient unless both possibilities allow for a finding of probable cause. "[I]t is fatal for an indictment or information to charge disjunctively in the words of the statute, if the disjunctive renders it uncertain as to which alternative is intended." 2 *Wharton's Criminal Procedure* § 291 (12th ed. 1975).[2] "If the indictment or information alleges the several acts in the disjunctive it fails to inform the defendant which of the acts he is charged with having committed, and it is insufficient." 1 C. Wright, *Federal Practice and Procedure*: Criminal 2d § , § 125 at 373-74. Binding precedent supports this interpretation:

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[2] The Supreme Court has frequently relied upon the authors of the Model Penal Code on various issues. *See, e.g., Liparota v. United States*, 471 U.S. 419, 423 n.5 (1985). In addition, Congress is presumptively familiar with scholarly writing in mens rea issues. *See Holloway v. United States*, 526 U.S. 1, 9 (1999) (observing that "it is reasonable to presume that Congress is familiar with the scholarly writing" on conditional intent issue and citing authors of the Model Penal Code and Professor LaFave).

> Once it is determined that the statute defines but a single offense, it becomes proper to charge the different means, denounced disjunctively in the statute, conjunctively in each count of the indictment." *United States v. UCO Oil Co.* 546 F.2d 833, 838 (9th Cir. 1976) (citing *United States v. Alsop*, 479 F.2d 65, 66 (9th Cir. 1973)), cert. denied, 430 U.S. 966, 97 S. Ct. 1646, 52 L. Ed. 2d 357 (1977).

If all powers have been transferred to the Secretary of the Department of Homeland Security, then the Attorney General's failure to consent is irrelevant. This indictment allows for a grand jury to find probable cause based on legally insufficient information. It should be dismissed. Further, Mr. Cruz-Sanchez asks for disclosure of the grand jury transcripts pursuant to Federal Rule of Criminal Procedure 6(e)(ii) to avoid a variance at trial between what was shown to the grand jury regarding the lack of consent and the evidence admitted at trial.

V.

THE GRAND JURY MISINSTRUCTION

A. Introduction

This argument evolves from the original grand jury misinstruction argument that was first considered in *United States v. Marcucci*, 299 F.3d 1156, 1158 (9th Cir. 2002), and his since enjoyed several iterations. The current point of dispute regards the dismissal of grand jurors who might not be inclined to indictment or who might consider punishment and the misinformation regarding the prosecutor's duty regarding exculpatory evidence. Mr. Cruz-Sanchez believes that those dismissals violated the grand jury guarantee.

B. Proceedings before the Grand Jury

The indictment in the instant case was returned by the January 2007 grand jury. *See Reporter's Partial Transcript of the Proceedings* (hereafter "Instructions"), dated January 11, 2007.[3] The instructions deviate, in several ways, from the instructions at issue in the major Ninth Circuit cases challenging a form grand jury instruction previously given in this district.[4]

After repeatedly emphasizing to the grand jurors that probable cause determination was their sole responsibility, *see Instructions* at 3, 3-4, 5, this Court instructed the grand jurors that they were forbidden "from judg[ing] the wisdom of the criminal laws enacted by Congress; that is, whether or not there should be a federal law or should not be a federal law designating certain activity [as] criminal is not up to you." *See id.* at 8. The instructions go beyond that, however, and tell the grand jurors that, should "you disagree with that judgment made by Congress, then your option is not to say 'well, I'm going to vote against indicting even though I think that the evidence is sufficient' or 'I'm going to vote in favor of even though the evidence may be insufficient.'" *See id.* at 8-9. Thus, the instruction flatly bars the grand jury from declining to indict because the grand jurors disagree with a proposed prosecution.

Immediately before limiting the grand jurors' powers in the way just described, this Court referred to an instance in the grand juror selection process in which it excused three potential jurors. *See id.* at 8.

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[3] Because this motion has been filed several times, counsel is not attaching the (lengthy) transcripts cited herein.

[4] *See, e.g.*, *United States v. Cortez-Rivera*, 454 F.3d 1038 (9th Cir. 2006); *United States v. Navarro-Vargas*, 408 F.3d 1184 (9th Cir.) (en banc), *cert. denied*, 126 S. Ct. 736 (2005) (*Navarro-Vargas II*); *United States v. Navarro-Vargas*, 367 F.3d 896 (9th Cir. 2004)(*Navarro-Vargas I*); *United States v. Marcucci*, 299 F.3d 1156 (9th Cir. 2002) (per curiam).

> I've gone over this with a couple of people. You understood from the questions and answers that a couple of people were excused, I think three in this case, because they could not adhere to the principle that I'm about to tell you.

Id. That "principle" was this Court's discussion of the grand jurors' inability to give effect to their disagreement with Congress. *See id.* at 8-9. Thus, this Court not only instructed the grand jurors on its view of their discretion; it enforced that view on pain of being excused from service as a grand juror.

In addition to its instructions on the authority to choose not to indict, this Court also assured the grand jurors that prosecutors would present to them evidence that tended to undercut probable cause. *See id.* at 20.

> Now, again, this emphasizes the difference between the function of the grand jury and the trial jury. You're all about probable cause. If you think that there's evidence out there that might cause you to say "well, I don't think probable cause exists," then it's incumbent upon you to hear that evidence as well. As I told you, in most instances, *the U.S. Attorneys are duty-bound to present evidence that cuts against what they may be asking you to do if they're aware of that evidence.*

Id. (emphasis added). This Court later returned to the notion of the prosecutors and their duties, advising the grand jurors that they "can expect that the U.S. Attorneys that will appear in from of [them] will be candid, they'll be honest, and ... they'll act in good faith in all matters presented to you." *See id.* at 27.

Mr. Cruz-Sanchez was indicted by the January 2007 grand jury on March 5, 2008.

C. ***Navarro-Vargas* Establishes Limits on the Ability of Judges to Constrain the Powers of the Grand Jury.**

The Ninth Circuit has, over vigorous dissents, rejected challenges to various instructions given to grand jurors in the Southern District of California. *See Navarro-Vargas II*, 408 F.3d 1184. While the Ninth

Circuit has thus far (narrowly) rejected such challenges, it has, in the course of adopting a highly formalistic approach[5] to the problems posed by the instructions, endorsed many of the substantive arguments raised by the defendants in those cases. The grand jury's instructions cannot be reconciled with the role of the grand jury as set forth in *Navarro-Vargas II*.

For instance, with respect to the grand jury's relationship with the prosecution, the *Navarro-Vargas II* majority acknowledges that the two institutions perform similar functions: "'the public prosecutor, in deciding whether a particular prosecution shall be instituted or followed up, performs much the same function as a grand jury.'" *Navarro-Vargas II*, 408 F.3d at 1200 (quoting *Butz v. Economou*, 438 U.S. 478, 510 (1978)). *Accord Navarro-Vargas I*, 367 F.3d at 900 (Kozinski, J., dissenting) (The grand jury's discretion in this regard "is most accurately described as prosecutorial."). *See also Navarro-Vargas II*, 408 F.3d at 1213 (Hawkins, J., dissenting). It recognizes that the prosecutor is not obligated to proceed on any indictment or presentment returned by a grand jury, *id.*, but also that "the grand jury has no obligation to prepare a presentment or to return an indictment drafted by the prosecutor." *Id.* *See* Niki Kuckes, *The Democratic Prosecutor: Explaining the Constitutional Function of the Federal Grand Jury*, 94 Geo. L.J. 1265, 1302 (2006) (the grand jury's discretion not to indict was "'arguably . . . the most important attribute of grand jury review from the perspective of those who insisted that a grand jury clause be included in the Bill of Rights'") (quoting Wayne LaFave et al., *Criminal Procedure* § 15.2(g) (2d ed. 1999)).

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[5] *See Navarro-Vargas II*, 408 F.3d at 1210-11 (Hawkins, J., dissenting) (criticizing the majority because "[t]he instruction's use of the word 'should' is most likely to be understood as imposing an inflexible 'duty or obligation' on grand jurors, and thus to circumscribe the grand jury's constitutional independence.").

Indeed, the *Navarro-Vargas II* majority agrees that the grand jury possesses all the attributes set forth in *Vasquez v. Hillery*, 474 U.S. 254 (1986). *See id.*

> The grand jury thus determines not only whether probable cause exists, but also whether to "charge a greater offense or a lesser offense; numerous counts or a single count; and perhaps most significant of all, a capital offense or a non-capital offense -- all on the basis of the same facts. And, significantly, the grand jury may refuse to return an indictment even "'where a conviction can be obtained.'"

Id. (quoting *Vasquez*, 474 U.S. at 263). The Supreme Court has itself reaffirmed *Vasquez*'s description of the grand jury's attributes in *Campbell v. Louisiana*, 523 U.S. 392 (1998), noting that the grand jury "controls not only the initial decision to indict, but also significant questions such as how many counts to charge and whether to charge a greater or lesser offense, including the important decision whether to charge a capital crime." *Id.* at 399 (citing *Vasquez*, 474 U.S. at 263).

Judge Hawkins notes that the *Navarro-Vargas II* majority accepts the major premise of *Vasquez*: "the majority agrees that a grand jury has the power to refuse to indict someone even when the prosecutor has established probable cause that this individual has committed a crime." *See id.* at 1214 (Hawkins, J. dissenting). *Accord Navarro-Vargas I*, 367 F.3d at 899 (Kozinski, J., dissenting); *Marcucci*, 299 F.3d at 1166-73 (Hawkins, J., dissenting). In short, the grand jurors' prerogative not to indict enjoys strong support in the Ninth Circuit. But not in the instructions.

D. The Instructions Forbid the Exercise of Grand Jury Discretion Established in Both *Vasquez* and *Navarro-Vargas II*.

The *Navarro-Vargas II* majority found that the instruction in that case "leave[s] room for the grand jury to dismiss even if it finds probable cause," 408 F.3d at 1205, adopting the analysis in its previous decision in *Marcucci*. *Marcucci* reasoned that the instructions do not mandate that grand jurors indict upon every finding of probable cause because the term "should" may mean "what is probable or expected." 299 F.3d at 1164 (citation omitted). That reading of the term "should" makes no sense in context, as Judge Hawkins ably pointed out. *See Navarro-Vargas II*, 408 F.3d at 1210-11 (Hawkins, J., dissenting) ("The instruction's use of the word 'should' is most likely to be understood as imposing an inflexible 'duty or obligation' on grand jurors, and thus to circumscribe the grand jury's constitutional independence."). *See also id.* ("The 'word' should is used to express a duty [or] obligation.") (quoting *The Oxford American Diction and Language Guide* 1579 (1999) (brackets in original)).

The debate about what the word "should" means is irrelevant here; these instructions make no such fine distinction. The grand jury instructions make it painfully clear that grand jurors simply may not choose not to indict in the event of what appears to them to be an unfair application of the law: should "you disagree with that judgment made by Congress, then your option is not to say 'well, I'm going to vote against indicting even though I think that the evidence is sufficient'...." *See Instructions* at 8-9. Thus, the instruction flatly bars the grand jury from declining to indict because they disagree with a proposed prosecution. No grand juror would read this language as instructing, or even allowing, him or her to assess "the need to indict." *Vasquez*, 474 U.S. at 264.

Nor does the *Navarro-Vargas II* majority's faith in the structure of the grand jury a cure for the instructions excesses. The *Navarro-Vargas*

II majority attributes "[t]he grand jury's discretion -- its independence -- [to] the absolute secrecy of its deliberations and vote and the unreviewability of its decisions." 408 F.3d at 1200. As a result, the majority discounts the effect that a judge's instructions may have on a grand jury because "it is the *structure* of the grand jury process and its *function* that make it independent." *Id.* at 1202 (emphases in the original).

Judge Hawkins sharply criticized this approach. The majority, he explains, "believes that the 'structure' and 'function' of the grand jury -- particularly the secrecy of the proceedings and unreviewability of many of its decisions -- sufficiently protects that power." *See id.* at 1214 (Hawkins, J., dissenting). The flaw in the majority's analysis is that "[i]nstructing a grand jury that it lacks power to do anything beyond making a probable cause determination ... unconstitutionally undermines the very structural protections that the majority believes save[] the instruction." *Id.* After all, it is an "'almost invariable assumption of the law that jurors follow their instructions.'" *Id.* (quoting *Richardson v. Marsh*, 481 U.S. 200, 206 (1987)). If that "invariable assumption" were to hold true, then the grand jurors could not possibly fulfill the role described in *Vasquez*. Indeed, "there is something supremely cynical about saying that it is fine to give jurors erroneous instructions because nothing will happen if they disobey them." *Id.*

In setting forth Judge Hawkins' views, Mr. Cruz-Sanchez understands that this Court may not adopt them solely because the reasoning that supports them is so much more persuasive than the majority's sophistry. Rather, he sets them forth to urge the Court *not to extend* what is already untenable reasoning.

Here, again, the question is not an obscure interpretation of the word "should", but an absolute ban on the right to refuse to indict that directly conflicts with the recognition of that right in *Vasquez*, *Campbell*, and both *Navarro-Vargas II* opinions. *Navarro-Vargas II* is distinguishable on that basis, but not only that.

This Court's interactions with two potential grand jurors who indicated that, in some unknown set of circumstances, they might decline to indict even where there was probable cause, emphasize this mistaken view of grand jury discretion. Because of the redactions of the grand jurors' names, Mr. Cruz-Sanchez will refer to them by occupation. One is a retired clinical social worker (hereinafter CSW), and the other is a real estate agent (hereinafter REA). The CSW indicated a view that no drugs should be considered illegal and that some drug prosecutions were not an effective use of resources. *See Voir Dire Transcript* at 16. The CSW was also troubled by certain unspecified immigration cases. *See id.*

This Court did not determine what sorts of drug and immigration cases troubled the CSW. It never inquired as to whether the CSW was at all troubled by the sorts of cases actually filed in this district, such as drug smuggling cases and cases involving reentry after deportation and alien smuggling. Rather, he provided instructions suggesting that, in any event, any scruples LCW may have possessed were simply not capable of expression in the context of grand jury service.

> Now, the question is can you fairly evaluate [drug cases and immigration cases]? Just as the defendant is ultimately entitled to a fair trial and the person that's accused is entitled to a fair appraisal of the evidence of the case that's in front of you, so, too, is the United States entitled to a fair judgment. If there's probable cause, then the case should go forward. *I wouldn't want you to say*, "well, yeah, there's probable cause, but I still don't like what our government is doing. I disagree with these laws, so I'm not going to vote for it to go forward." If that is your frame of mind, the probably you shouldn't serve. Only you can tell me

that.

See id. at 16-17 (emphasis added). Thus, without any sort of context whatsoever, this Court let the grand juror know that he would not want him or her to decline to indict in an individual case where the grand juror "[didn't] like what our government is doing," *see id.* at 17, but in which there was probable cause. *See id.* Such a case "should go forward." *See id.* Given that blanket proscription on grand juror discretion, made manifest by this Court's use of the pronoun "I", the CSW indicated that it "would be difficult to support a charge even if [the CSW] thought the evidence warranted it." *See id.* Again, this Court's question provided no context; it inquired regarding "a case," a term presumably just as applicable to possession of a small amount of medical marijuana as kilogram quantities of methamphetamine for distribution. Any grand juror listening to this exchange could only conclude that there was *no* case in which this Court would permit them to vote "no bill" in the face of a showing probable cause.

That same point was emphasized in this Court's exchange with REA. REA first advised the Court of a concern regarding the "disparity between state and federal law" regarding "medical marijuana." *See id.* at 24. This Court first sought to address REA's concerns about medical marijuana by stating that grand jurors, like trial jurors, are simply forbidden from taking penalty considerations into account.

> Well, those things -- the consequences of your determination shouldn't concern you in the sense that penalties or punishment, things like that -- we tell trial jurors, of course, that they cannot consider the punishment or the consequence that Congress has set for these things. We'd ask you to also abide by that. We want you to make a business-like decision of whether there was a probable cause. ...

Id. at 24-25. Having stated that REA was to "abide" by the instruction given to trial jurors, this Court went on to suggest that REA recuse him or herself from medical marijuana cases. *See id.* at 25.

In response to further questioning, REA disclosed REA's belief "that drugs should be legal." *See id.* That disclosure prompted this Court to begin a discussion that ultimately led to an instruction that a grand juror is obligated to vote to indict if there is probable cause.

> I can tell you sometimes I don't agree with some of the legal decisions that are indicated that I have to make. But my alternative is to vote for someone different, vote for someone that supports the policies I support and get the law changed. It's not for me to say, "well, I don't like it. So I'm not going to follow it here."
>
> You'd have a similar obligation as a grand juror even though you might have to grit your teeth on some cases. Philosophically, if you were a member of congress, you'd vote against, for example, criminalizing marijuana. I don't know if that's it, but you'd vote against criminalizing some drugs.
>
> That's not what your prerogative is here. You're prerogative instead is to act like a judge and say, "all right. This is what I've to deal with objectively. Does it seem to me that a crime was committed? Yes. Does it seem to me that this person's involved? It does." *And then your obligation, if you find those to be true, would be to vote in favor of the case going forward.*

Id. at 26-27 (emphasis added). Thus, the grand juror's duty is to conduct a simple two part test, which, if both questions are answered in the affirmative, lead to an "obligation" to indict.

Having set forth the duty to indict, and being advised that REA was "uncomfortable" with that paradigm, this Court reinforced the "obligation" to indict in every case in which there was probable cause.

> The Court: do you think you'd be inclined to let people go in drug cases even though you were convinced there was probable cause they committed a drug offense?
> REA: It would depend on the case.
> The Court: Is there a chance that you would do that?
> REA: Yes.
> The Court: I appreciate your answers. I'll excuse you at this time.

Id. at 27. Two aspects of this exchange are crucial. First, REA plainly does not intend to act solely on his political belief in decriminalization -- whether he or she would indict "depend[s] on the case," *see id.*, as it should. Because REA's vote "depend[s] on the case," *see id.*, it is necessarily true that REA would vote to indict in some (perhaps many or even nearly all) cases in which there was probable cause. Again, this Court did not explore REA's views; it did not ascertain what sorts of cases would prompt REA to hesitate. The message is clear: it does not matter what type of case might prompt REA's reluctance to indict because, once the two part test is satisfied, the "obligation" is "to vote in favor of the case going forward." *See id.* at 27. That is why even the "chance," *see id.*, that a grand juror might not vote to indict was too great a risk to run. The structure of the grand jury and the secrecy of its deliberations cannot embolden grand jurors who are no longer serving, apparently because they expressed their willingness to act as the conscience of the community. *See Navarro-Vargas II*, 408 F.3d at 1210-11 (Hawkins, J., dissenting) (a grand jury exercising its powers under *Vasquez* "serves ... to protect the accused from the other branches of government by acting as the 'conscience of the community.'") (quoting *Gaither v. United States*, 413 F.2d 1061, 1066 & n.6 (D.C. Cir. 1969)). The federal courts possess only "very limited" power "to fashion, on their own initiative, rules of grand jury procedure," *United States v. Williams*, 504 U.S. 36, 50 (1992), and, here, this Court has both fashioned his own rules and enforced them. The instructions here are therefore structural error. *See Navarro-Vargas II*, 408 at 1216-17 (Hawkins, J., dissenting). The indictment must be dismissed.

Nor can the word games played by the *Navarro-Vargas II* and *Marcucci* majorities save the instructions: *in their entirety*, the instructions here prohibited the grand jury from exercising the discretion established in both *Vasquez* and *Navarro-Vargas II*, specifically the discretion to not indict even if the grand jury finds probable cause. *See Vasquez*, 474 U.S. at 264; *Navarro-Vargas II*, 408 F.3d at 1200. As noted above, because the model charge "does not state that the jury 'must' or 'shall' indict, but merely that it 'should' indict if it finds probable cause," *Navarro-Vargas II* held that the model instruction did not violate the grand jury's independence. *See* 408 F.3d at 1205. Resort to that unlikely reading of the word "should" is to no avail here.

It is true that on several occasions, this Court used the word "should" instead of "shall" with respect to whether an indictment was required if probable cause existed. In context, however, it is clear that he could only mean "should" in the obligatory sense. For example, when addressing a prospective juror, this Court not only told the jurors that they "should" indict if there is probable cause, it told them that if there is not probable cause, "then the grand jury should hesitate and not indict." *See Voir Dire* at 8. At least in context, it would strain credulity to suggest that this Court was using "should" for the purpose of "leaving room for the grand jury to [indict] even if it finds [no] probable cause." *See Navarro-Vargas II*, 408 F.3d at 1205.

The full passage cited above effectively eliminates any possibility that this Court intended the *Navarro-Vargas II* spin on the word "should."

> [T]he grand jury is determining really two factors: "do we have a reasonable belief that a crime was committed? And second, do we have a reasonable belief that the person that they propose that we indict committed the crime?"
>
> If the answer is "yes" to both of those, then the case should move forward. If the answer to either of the questions is "no," then the grand jury should not hesitate and not indict.

See Voir Dire at 8. Of the two sentences containing the word "should," the latter of the two essentially states that if there is no probable cause, you *should* not indict. This Court could not possibly have intended to "leav[e] room for the grand jury to [indict] even if it finds [no] probable cause." *See Navarro-Vargas II*, 408 F.3d at 1205 (citing *Marcucci*, 299 F.3d at 1159). That would contravene the grand jury's historic role of protecting the innocent. *See, e.g., United States v. Calandra*, 414 U.S. 338, 343 (1974) (The grand jury's "responsibilities continue to include both the determination whether there is probable cause and the protection of citizens against unfounded criminal prosecutions.") (citation omitted).

By the same token, if this Court said that "the case should move forward" if there is probable cause, but intended to "leav[e] room for the grand jury to dismiss even if it finds probable cause," *see Navarro-Vargas II*, 408 F.3d at 1205 (citing *Marcucci*, 299 F.3d at 1159), then it would have to have intended two different meanings of the word "should" in the space of two consecutive sentences. That could not have been this Court's intent. But even if it were, no grand jury could ever have had that understanding. Jurors are not presumed to be capable of sorting through internally contradictory instructions. *See generally United States v. Lewis*, 67 F.3d 225, 234 (9th Cir. 1995) ("where two instructions conflict, a reviewing court cannot presume that the jury followed the correct one") (citation, internal quotations and brackets omitted). Finally, even if a juror could somehow latch onto some tenuous claim of ambiguity in the word "should," the Court eliminated any sort of permissive construction by advising the grand jurors of the "obligation" to indict if there is probable cause. *See Voir Dire* at 26-27.

E. The Instructions Conflict With *Williams*' Holding that there Is No Duty to Present Exculpatory Evidence to the Grand Jury.

In *Williams*, the defendant, although conceding that it was not required by the Fifth Amendment, argued that the federal courts should exercise their supervisory power to order prosecutors to disclose exculpatory evidence to grand jurors, or, perhaps, to find such disclosure required by Fifth Amendment common law. *See* 504 U.S. at 45, 51. *Williams* held that "as a general matter at least, no such 'supervisory' judicial authority exists." *See id.* at 47. Indeed, although the supervisory power may provide the authority "to dismiss an indictment because of misconduct before the grand jury, at least where that misconduct amounts to a violation of one of those 'few, clear rules which were carefully drafted and approved by this Court and by Congress to ensure the integrity of the grand jury's functions,'" *id.* at 46 (citation omitted), it does not serve as "a means of *prescribing* such standards of prosecutorial conduct in the first instance." *Id.* at 47 (emphasis added). The federal courts possess only "very limited" power "to fashion, on their own initiative, rules of grand jury procedure." *Id.* at 50. As a consequence, *Williams* rejected the defendant's claim, both as an exercise of supervisory power and as Fifth Amendment common law. *See id.* at 51-55.

Despite the holding in *Williams*, the instructions here assure the grand jurors that prosecutors would present to them evidence that tended to undercut probable cause. *See Instructions* at 20.

> Now, again, this emphasizes the difference between the function of the grand jury and the trial jury. You're all about probable cause. If you think that there's evidence out there that might cause you say "well, I don't think probable cause exists," then it's incumbent upon you to hear that evidence as well. As I told you, in most instances, *the U.S. Attorneys are duty-bound to present evidence that cuts against what they may be asking you to do if they're aware of that*

evidence.

Id. (emphasis added). Moreover, this Court later returned to the notion of the prosecutors and their duties, advising the grand jurors that they "can expect that the U.S. Attorneys that will appear in from of [them] will be candid, they'll be honest, and ... they'll act in good faith in all matters presented to you." *See id.* at 27.

This particular instruction has a devastating effect on the grand jury's protective powers, particularly if it is not true. It begins by emphasizing the message that *Navarro-Vargas II* somehow concluded was not conveyed by the previous instruction: "You're all about probable cause." *See id.* at 20. Thus, once again, the grand jury is reminded that they are limited to probable cause determinations. The instruction goes on to tell the grand jurors that they should consider evidence that undercuts probable cause, but also advises the grand jurors that the prosecutor will present it. The end result, then, is that grand jurors should consider evidence that goes against probable cause, but, if none is presented by the government, they can presume that there is none. After all, "in most instances, the U.S. Attorneys are duty-bound to present evidence that cuts against what they may be asking you to do if they're aware of that evidence." *See id.* Thus, if the exculpatory evidence existed, it necessarily would have been presented by the "duty-bound" prosecutor, because the grand jurors "can expect that the U.S. Attorneys that will appear in from of [them] will be candid, they'll be honest, and ... they'll act in good faith in all matters presented to you." *See id.* at 27.

These instructions create a presumption that, in cases where the prosecutor does not present exculpatory evidence, no exculpatory evidence exists. A grand juror's reasoning, in a case in which no exculpatory evidence was presented, would proceed along these lines:

> (1) I have to consider evidence that undercuts probable cause.
> (2) The candid, honest, duty-bound prosecutor would, in good faith, have presented any such evidence to me, if it existed.
> (3) Because no such evidence was presented to me, I may conclude that there is none.

Even if some exculpatory evidence were presented, a grand juror would necessarily presume that the evidence presented represents the universe of all available exculpatory evidence; if there was more, the duty-bound prosecutor would have presented it.

The instructions therefore discourage investigation -- if exculpatory evidence were out there, the prosecutor would present it, so investigation is a waste of time -- and provide additional support to every probable cause determination: i.e., this case may be weak, but I know that there is nothing on the other side of the equation because it was not presented. A grand jury so badly misguided is no grand jury at all under the Fifth Amendment.

F. The Absolute Prohibition on Consideration of Penalty Information Violates *Vasquez*.

The instructions advise the grand jurors that they are forbidden from considering the penalties to which indicted persons may be subject.

> Prospective Juror (REA): ... And as far as being fair, it kind of depends on what the case is about because there is a disparity between state and federal law.
> The Court: In what regard?
> Prospective Juror: Specifically, medical marijuana.
> The Court: Well, those things -- the consequences of your determination shouldn't concern you in the sense that penalties or punishment, things like that -- *we tell trial jurors, of course, that they cannot consider the punishment or the consequence that Congress has set for these things. We'd ask you to also abide by that.* We want you to make a business-like decision of whether there was a probable cause.
> ...

See Voir Dire at 24-25 (emphasis added). A "business-like decision of whether there was a probable cause" would obviously leave no role for the consideration of penalty information.

The Ninth Circuit previously rejected a claim based upon the proscription against consideration of penalty information based upon the same unlikely reading of the word "should" employed in *Marcucci*. *See Cortez-Rivera*, 454 F.3d at 1040-41. *Cortez-Rivera* is inapposite for two reasons. First, this Court did not use the term "should" in the passage quoted above. Second, that context, as well as this Court's consistent use of a mandatory meaning in employing the term, eliminate the ambiguity (if there ever was any) relied upon by *Cortez-Rivera*. The instructions again violate *Vasquez*, which plainly authorized consideration of penalty information. *See* 474 U.S. at 263.

G. The Errors Are Structural.

The errors here are constitutional: Mr. Cruz-Sanchez is entitled to the "traditional functioning of the institution that the Fifth Amendment demands," *see Williams*, 504 U.S. at 51, and the instructions do not permit the grand jury to perform its function as is demonstrated by the instructions' many conflicts with *Vasquez*. That error is structural. *See Navarros-Vargas*, 408 F.3d at 1214, 1216-17 (Hawkins, J., dissenting). *Accord Navarros-Vargas*, 367 F.3d at 903 (Kozinski, J., dissenting).[6] Nevertheless, even were this Court restricted to exercising its supervisory powers, the decision to excuse at least two grand jurors created the necessary prejudice to warrant dismissal.

H. This Court Should Order Disclosure of the Instructions.

Judge Moskowitz has ruled on a motion similar to that filed by Mr.

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[6] Because the *Navarro-Vargas II* majority found no error in the form instruction given, and not modified, in that case, the majority had no occasion to address the structural error analyses in Judge Hawkins' and Judge Kozinski's dissents. This Court may therefore rely upon them as the persuasive authority of six Ninth Circuit judges.

Cruz-Sanchez. *See United States v. Martinez-Covarrubias*, Case No. 07cr0491-BTM, Order Denying Defendant's Motion to Dismiss the Indictment, dated October 11, 2007 (hereinafter "Order"). While Mr. Cruz-Sanchez disagrees with Judge Moskowitz's analysis, Judge Moskowitz at least recognizes that the instruction cited above is error, although he incorrectly found that it was not structural. *See Order* at 11. Because, under Judge Moskowitz's analysis, this Court must determine whether the error was harmless, Mr. Cruz-Sanchez files the instant motion to produce the transcripts of the grand jury proceedings that resulted in the instant indictment.

VI.

FILE FURTHER MOTIONS

Mr. Cruz-Sanchez also requests that he be allowed to file further motions as new discovery demonstrates their necessity. Mr. Cruz-Sanchez is not filing his collateral attack on the deportation yet as he has not had access to his A-file which is a prerequisite to filing the motion.

VII.

CONCLUSION

Mr. Cruz-Sanchez requests that the Court grant these motions and dismiss the case.

Respectfully submitted,

Dated: August 1, 2008

S/ David Zugman
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